THE

AMERICAN LAW REGISTER.

OCTOBER, 1890.

AMERICAN RIGHTS IN THE BEHRING SEA.

The Behring Sea controversy includes two questions—the one of fact, the other of law. First, is the suppression of unauthorized sealing in Behring Sea necessary for the preservation of our seal fishery? Second, if such suppression is necessary, have the United States the right to suppress it at points more than three miles from land?

The facts adduced by Mr. Blaine in his letter of January 22, 1890, to Sir Julian Pauncefote, that the fur seals have been exterminated in every part of the world except Behring Sea, and that the wanton destruction of seals in that Sea by Canadian vessels during the last four years, has reduced the product of the fishery by forty per centum, would seem to be conclusive evidence that the first question must be answered in the affirmative.

Assuming then, that the suppression of sea fishing for seals in Behring Sea, is necessary for the preservation of the seals, let us discuss the legal question whether the United States have the right to stop such fishing. The English claim is, that, at the distance of three marine miles from land, the jurisdiction of the United States over foreign vessels abruptly ends, that beyond that limit a vessel flying the British flag may with impunity commit any act short of actual piracy. The American position is, that ownership of the land on which seals make their home, carries with it the right to protect them from wanton destruction, even beyond the three-mile belt.

I.

Whether the open sea is susceptible of ownership, is a question which has perplexed jurists and drawn nations into war. In 1609, Grotius published his celebrated treatise *De Mare Libero*, in which he endeavored to prove, both by argument and authority, that the sea, being the common heritage of all, could not become the property of any one nation. The opposite view was ably maintained by Selden, in his *Mare Clausum*, published in 1635. Since then the controversy has been carried on by the different writers on international law, the old arguments and the old authorities being gone over again and again, without producing unanimity of opinion.

Nor has the conduct of the different governments been any more harmonious than the writings of the jurists. The right to appropriate part or all of the sea has been affirmed or denied as suited the interest of each particular nation.

Thus England has always claimed supremacy over the seas surrounding her coasts, even when Van Tromp sailed the English Channel with a broom at his masthead, while during the Napoleonic wars, she denied the right of the Baltic powers to maintain the neutrality of the Baltic sea.

Out of this chaos of conflicting arguments and inconsistent claims, there has been evolved the rule that each maritime nation has the right of exclusive jurisdiction over some part of the open sea adjoining its coasts. But how far that jurisdiction extends, has not been exactly determined. The rule is stated by different writers to rest on two different principles that have no necessary connection with each other. One is, that the jurisdiction shall extend only so far as its exercise may be enforced from land, that is to say, the distance of a cannon shot from the shore—conventionally spoken of as three marine miles, though modern ordinance have a range of thrice that distance. This is the principle on which England wishes to limit our jurisdiction in Behring Sea. The other principle is, that the jurisdiction shall extend so far as is necessary for the due protection of the rights of the nation and its citizens.

In most cases the three-mile limit is sufficient for all purposes, and it has therefore been adopted and enforced in numberless instances, and has acquired the sanction of long established usage. But where, as in case of the seal fishery, police powers must be exercised outside the three-mile limit in order to be effective, it becomes necessary to determine which of these two principles should prevail.

As there is no good reason for asserting jurisdiction, unless a necessity for its exercise exists, it seems to follow logically that the extent of the jurisdiction should be measured by the necessity which created it. And when we remember that in ninety-nine cases out of a hundred, this jurisdiction is enforced not by means of cannon on shore but by means of cannon on board of ships, the reason of the three-mile limit seems to have but an unsubstantial foundation. *Cessante ratione legis, cessat ipsa lex.*

The doctrine that sea jurisdiction is coterminous with the necessity, has been distinctly recognized and adopted by Great Britain. Thus in the preamble to an act of Parliament passed in 1878 (41 and 42 Vict. c. 73), it is stated that—

> The rightful jurisdiction of Her Majesty, her heirs and successors, extends and always has extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defense and security of such dominions.

It has also the authority of eminent jurists. It is said by Chancellor KENT:—

> It is difficult to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a State may lawfully extend its exclusive dominion over the sea adjoining its territories. All that can be reasonably asserted is that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety and for some lawful end: 1 Kent Com. *29.

The same doctrine is thus laid down by Mr. Chitty:—

> It is not easy to determine to what distance a nation may extend its rights over the sea by which it is surrounded. *Bodinus* pretends that, according to the common right of maritime nations, the Prince's dominion extends to the distance of thirty leagues from the coast. But between nation and nation, all that can reasonably be said is, that in general the do-

minion of the State over the neighboring sea extends as far as her safety renders it necessary and her power is able to enforce it: 1 Chitty Com. Law 99.

In Wharton's Digest of International Law, section 32, we find this statement:—

The limitation to three miles of the marine belt is based in part on treaty and in part on customary law. It does not of itself preclude the sovereign of the shore from exercising police jurisdiction over any destructive agencies, which, no matter at what distance from the shore, may inflict direct injury on the shore, or its territorial waters.

In the case of *Church* v. *Hubbart* (1804), 2 Cranch (6 U. S.) 234, Chief Justice MARSHALL laid down the law as follows:—

To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security, does not seem to be perfectly correct. The seizure of a vessel within the range of its cannon by a foreign force, is an invasion of its territory and is a hostile act, which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. In different seas and on different coasts a wider or more contracted range in which to exercise the vigilance of the government will be assented to.

It is to be remembered that this statement was not made in defense of the seizure of a foreign vessel by our government, but of the seizure of an American vessel on the high seas by a foreign power, so that the language used could not have been dictated by national prejudice.

The doctrine laid down in *Church* v. *Hubbart* has been acted on by both the United States and England. The British "hovering act," passed in 1736, (9 Geo. II, c. 35) assumed for revenue purposes, a jurisdiction of four leagues from the coast, by prohibiting foreign goods from being transshipped within that distance without payment of duties; and Congress in 1799 enacted that—

The officers of the revenue cutters shall go on board all vessels which arrive in the United States, or within four leagues of the coast thereof, if bound for the United States, and search and examine the same * * * and shall remain on board such vessels until they arrive at the port or place of their destination: Rev. Stat. § 2760.

The former act has been repealed by Parliament, but the right to enforce it has never been disclaimed, and was ex-

pressly asserted by Sir WILLIAM SCOTT, afterward Lord STOWELL, in the case of *Le Louis* (1817) 2 Dods. Ad. 245.

In another way, too, has England asserted jurisdiction beyond the three-mile belt. The pearl fisheries of Ceylon, which extend from sixteen to twenty miles from shore, have been repeatedly leased by the British government and are now conducted by the government itself (Encyclopaedia Britannica, vol. 5, p. 364) and its title to these fisheries is maintained by English jurists: Chitty Com. Law 98.

So that if the decisions of Lord STOWELL and of Chief Justice MARSHALL and the writings of Chancellor KENT and of Mr. CHITTY, are authority, and if the practice of the English as well as of the American government counts for anything, then the doctrine that a nation may, when necessary for its own protection, exercise jurisdiction beyond the conventional three-mile limit, must be taken to be a firmly established principle of international law, as that law is understood both in the United States and in England.

II.

In an English review of Wharton's Digest of International Law, contained in the Law Magazine and Review for November, 1889, it is said that it appears from the well sustained identity of language, held by former Presidents and Secretaries of State, that the historical tradition of the United States is in favor of that absolute freedom of the sea outside the three-mile belt which is contended for by the British government in regard to the seal fishery. This statement needs modification. If we examine the utterances of our Secretaries of State from JEFFERSON to BLAINE we will find that while accepting the three-mile limit as the ordinary rule for ordinary purposes, they recognize the fact that the rule has its exceptions, or rather its qualifications. Let us look at the record.

In 1793, Mr. JEFFERSON, then Secretary of State, wrote to the French Minister:—

The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, esti-

mated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us in reason, to as broad a margin of protected navigation as any nation whatever.

Thus, at the outset of our diplomatic history, the principle that the extent of a nation's jurisdiction over the ocean varies according to circumstances, was distinctly recognized.

In 1807, Mr. MADISON, while Secretary of State under JEFFERSON, in instructing the American Ministers at the Court of St. James, wrote as follows:

There could surely be no pretext for allowing less than a marine league from the shore, that being the narrowest allowance found in any authorities on the law of nations. If any nation can fairly claim a greater extent, the United States have pleas which cannot be rejected; and if any nation is more particularly bound by its own example not to control our claim, Great Britain must be so by the extent of her own claims to jurisdiction on the seas which surround her.

In 1863, when the United States resisted the claim of Spain to jurisdiction over the sea within six marine miles of the shore of Cuba, Mr. SEWARD admitted by implication that the jurisdictional limit might be varied by circumstances, for, after asserting the general doctrine of a three-mile belt, he adds:—

The undersigned is far from intimating that these facts furnish conclusive reasons for denying the claim a respectful consideration. On the contrary, he very cheerfully proceeds to consider a farther argument, derived, as Mr. TASSARA supposes, from reason and justice, which he has urged in respect to the claim. This ground is, that the shore of Cuba is, by reasons of its islets and smaller rocks, such as to require that the maritime jurisdiction of Cuba, in order to purposes of effective defense and police, should be extended to the breadth of six miles.

Mr. SEWARD then proceeds to discuss the question of fact, whether the physical conditions of the Cuban coasts are such as to require an extension of the ordinary maritime jurisdiction. The claim of Spain is rejected by him, not because the argument by which it was defended was invalid, but because the assumed facts on which that argument rested did not exist.

In 1886, Mr. BAYARD, in discussing the right of fishing in the Atlantic Ocean, after asserting the steady adherence of the United States to the doctrine of the three-mile limit adds:—

> It is true that there are qualifications to this rule.

From these quotations it may be seen, that while the United States have uniformly asserted, in no uncertain tones, their jurisdiction over the water within the three-mile belt adjoining their coasts, they have repeatedly admitted that the rule may be so qualified by the necessities of the case as to warrant the exercise of territorial jurisdiction beyond that limit. So that our present claim is not a departure from our traditional policy, as English writers on this subject declare, but is merely the assertion of a right which we have never denied, but which we have seldom been called upon to affirm.

III.

Hitherto we have considered the question under the general rules of international law. But there are circumstances which give us peculiar rights in Behring Sea, and we can fairly claim jurisdiction over its waters within one hundred miles from land by virtue of immemorial use with the tacit consent of Great Britain.

It is admitted by VATTEL, a strenuous advocate of the freedom of the sea, that the exclusive right of navigation or fishery in the sea, may be gained by one nation on the ground of immemorial use and lost by others by non-user, when such non-user assumes the nature of a consent or tacit agreement: *Droit des Gens*, book 1, ch. 23, §§ 279-286. This is indeed the foundation of all title to territorial jurisdiction whether on land or sea.

That our right to jurisdiction in Behring Sea outside the three-mile belt has this foundation, is matter of history.

In 1799, the Emperor PAUL, of Russia, asserted Russia's jurisdiction over Behring Sea, and the coast of North America down to the fifty-fifth degree of North latitude

This claim, so far as I have been able to learn, was never disputed. In 1821, the Emperor ALEXANDER reiterated his father's claim, but instead of confining his jurisdiction to the bounds named in the ukase of 1799, he claimed, in addition to Behring Sea, all the land and water lying North of a line drawn due East from the Southern extremity of the Aleutian Islands in latitude 51°, thus taking in the entire coast of North America down to a point not far from the present Northern boundary of the State of Washington, and all that part of the ocean lying East of Behring Sea. To appreciate the difference between the claim asserted in 1799 and that put forward in 1821, we must remember that the curve of the Aleutian Archipelago forming the Southern boundary of Behring Sea, swings so far to the South that the Southernmost island of the group, in latitude 51°, lies due West of Vancouver's Island, and that while Behring Sea is a body of water having well defined boundaries, being cut off from the Pacific Ocean by the chain of the Aleutian Islands, the water East of Behring Sea is part of the Pacific Ocean with nothing but an imaginary line to separate it from the rest of the ocean. The United States protested against this unwarranted extension of Russian territory, asserted their right of navigating the Pacific Ocean, denied Russia's title to control the ocean, and obtained a treaty from Russia conceding freedom of navigation in the North Pacific. But neither the United States nor England ever denied Russia's claim to jurisdiction over Behring Sea or objected to her exercise thereof. In 1825, Great Britain entered into a treaty with Russia, in which freedom of navigation in the North Pacific was conceded and the boundary line between Russian and British America was defined, but in which no provision was inserted which in any way modified or denied Russia's claim of jurisdiction over Behring Sea. It is also noteworthy that while England reserved the right of navigating to their mouths all rivers rising in her territory and flowing through the Russian possessions into the Pacific Ocean, no such right was reserved as to the great Yukon River, a stream eighteen hundred miles long, which rises in British territory and

empties into Behring Sea. Why was not the right of navigating this river reserved by England unless because Behring Sea, into which it flows, was recognized as Russian property?

In 1867, Russia ceded Alaska to the United States, and with it transferred all her rights in that part of Behring Sea lying within the ceded territory. And until 1886, no attempt was made by the subjects of Great Britain to hunt seals in Behring Sea. In view of these facts, it does not seem strange that the British government has found no adequate answer to Mr. Blaine's question:—

Whence did the ships of Canada derive the right to do in 1886 that which they had refrained from doing for nearly ninety years?

The Russian ukase of 1821 did not wholly close Behring Sea against the ships of foreign nations, but it did forbid all foreign ships from approaching within one hundred miles of the shore, a regulation which subsequent experience has shown to be necessary to preserve the seals from extermination. Both the United States and Great Britain recognized, respected and obeyed this ukase as long as Alaska remained Russian property. For nineteen years after the session to the United States, England did not infringe its restrictions. That it was a wise regulation is shown by the fact that it has secured the preservation of the seal fishery. That it was a just one, is shown by the fact that it was universally acquiesced in for nearly ninety years. That it was a lawful one under the principles of international law, it has been the object of this article to prove. If it is wise, just and lawful, it is clearly the duty of the United States to enforce it.

Chicago, Ill. LOUIS BOISOT, JR.